Nos. 02-1893/1996

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LAC VIEUX DESERT BAND OF LAKE SUPERIOR CHIPPEWA INDIANS, a federally recognized Indian Tribe, Plaintiff-Appellant/ Cross-Appellee, v. THE CITY OF DETROIT, MICHIGAN; KWAME KILPATRICK; MARY ANN MAHAFFEY; KENNETH V. COCKREL, JR.; SHEILA COCKREL; BRENDA M. SCOTT; SHARON MCPHAIL; ALBERTA TINSLEY-TALABI; ALONZO W. BATES; BARBARA ROSE COLLINS; KAY EVERETT, Defendants-Appellees, ATWATER ENTERTAINMENT ASSOCIATES, L.L.C.; GREEK-TOWN CASINO, L.L.C.; DETROIT ENTERTAINMENT, L.L.C., Intervenors-Appellees, MGM GRAND DETROIT, L.L.C., Intervenor-Appellee/ Cross-Appellant,	ORDER (Filed Sep. 12, 2002)

MICHIGAN GAMING CONTROL BOARD,

Amicus Curiae.

Before: KRUPANSKY and CLAY, Circuit Judges; GWIN, District Judge.*

The plaintiff appeals the denial of its motion for additional relief in this declaratory judgment action in which the district court found that a Detroit ordinance governing the selection of three casino developers was unconstitutional. Intervenor MGM Grand Detroit, L.L.C. ("MGM") cross appeals the denial of its motion for summary judgment as moot. The plaintiff now seeks an injunction pending appeal and moves to expedite its appeal. Although neither the defendants nor the intervenors oppose the motion to expedite, they vigorously oppose the issuance of the requested injunction pending appeal. In addition, MGM moves to strike the plaintiff's motion for an injunction for failure to comply with the page limitation and the one document requirement, and Intervenors Atwater Entertainment, L.L.C., Detroit Entertainment, L.L.C., and Greektown Casino, L.L.C. move to file a consolidated response and to exceed the page limitation. The plaintiff opposes the motion to strike and moves to file its oversized brief instanter.

We consider the traditional standards for granting injunctive relief in ruling on a motion for an injunction pending appeal and balance the following: 1) whether the plaintiff has demonstrated a likelihood of success on the

* The Honorable James S. Gwin, United States District Judge for the Northern District of Ohio, sitting by designation.

merits; (2) whether it will be irreparably injured in the absence of a stay; 3) whether a stay will substantially injure other interested persons; and 4) where the public interest lies. *Nader v. Blackwell*, 230 F.3d 833, 834 (6th Cir. 2000) (order); *Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991). The plaintiff was successful on the merits of its challenge to the city ordinance and has demonstrated a likelihood of success on the merits of its appeal and irreparable harm. Moreover, the defendants, the intervenors, and other interested parties are not likely to suffer substantial harm if development of the permanent casinos is delayed while this court considers the appeal.

Having considered all of the material filed by the parties, we **DENY** MGM's motion to strike, **GRANT** the intervenors' motion to file a consolidated response exceeding the page limitation, and **GRANT** the plaintiff's motion to file an oversized brief instanter. The plaintiff's motion for an injunction pending appeal is **GRANTED** insofar as the City of Detroit is temporarily enjoined from issuing any building permits for the permanent casino facilities and the Intervenor developers are enjoined from commencing construction of the permanent casino facilities. The motion to expedite the appeal is **GRANTED**, and the clerk is directed to schedule these appeals for oral argument as soon as practical after the completion of briefing.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
Clerk

2002 WL 27290
___ F.3d ___

Only the Westlaw citation is currently available.

United States Court of Appeals,
Sixth Circuit.

LAC VIEUX DESERT BAND OF LAKE SUPERIOR CHIPPEWA INDIANS, Plaintiff-Appellant,

v.

The MICHIGAN GAMING CONTROL BOARD; The City of Detroit; Atwater Entertainment Associates, L.L.C.; Greektown Casino, L.L.C., Defendants-Appellees.

No. 00-1879.

Argued April 24, 2001.
Decided and Filed Jan. 11, 2002.

G. Michael Fenner (argued), Creighton University School of Law, Conly J. Schulte (briefed), Monteau & Peebles, Omaha, NE, for Appellant.

Morley Witus (argued and briefed), Barris, Sott, Denn & Driker, Detroit, MI, Bruce R. Greene (briefed), Boulder, CO, John D. Pirich (briefed), John S. Kane (briefed), Honigman, Miller, Schwartz & Cohn, Lansing, MI, for Appellees.

Before: MARTIN, Chief Judge; MOORE, Circuit Judge; O'MALLEY, District Judge.*

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* The Honorable Kathleen M. O'Malley, United States District Judge for the Northern District of Ohio, sitting by designation.

MARTIN, C.J., delivered the opinion of the court, in which MOORE, J., joined. O'MALLEY, D.J. (pp. ___-___), delivered a separate dissenting opinion.

OPINION

BOYCE F. MARTIN, JR., Chief Judge.

Upon the legalization of gambling in Detroit, the City enacted an ordinance establishing how it would issue three licenses for the operation of its new casinos. Everyone interested in this opportunity should have been allowed to compete for it on the same terms. The ordinance instead incorporated an advantage for two companies that had been active in the movement to legalize the gambling in the first place. Because Detroit based the advantage on that activity, and thereby penalized potential applicants who did not engage in it themselves, we hold that the ordinance in its current form is unconstitutional.

I.

Defendants Atwater Entertainment Associates and Greektown Casino organized petition drives to lift Michigan's ban on off-reservation gambling. First, they helped place two initiatives on the Detroit city ballot that, in tandem, would authorize casinos within the city limits so long as voters statewide approved as well. When the Detroit initiatives passed, Atwater and Greektown proceeded to organize the necessary statewide referendum, widely known as "Proposal E." Proposal E also passed. As a result, casino gambling in Detroit became legal.

Next, the Michigan state legislature passed the Michigan Gaming Control and Revenue Act, permitting the mayor of Detroit to choose three casino licensees. The city's related ordinance, the subject of this case, governed the mayor's selections. In numerous respects, the ordinance rewards Atwater and Greektown for their efforts during the state and local referenda campaigns. For example, the ordinance includes a "statement of intent" declaring that "it is in the best interest of the City to provide a preference to those developers who took the initiative to facilitate the development of casino gaming in the City of Detroit by proposing a casino gaming proposal approved by the voters of the City, and who actively promoted and significantly supported the State initiative authorizing gaming." Detroit City Code, § 18-13-1(i). Another portion expressly prefers casino developers who, assuming they meet the other eligibility criteria, were "initiator[s] of a casino gaming proposal which was approved by the voters of this City prior to January 1, 1995; and . . . made significant contributions to the development of gaming within the City by actively promoting and significantly supporting a state initiative authorizing gaming." Detroit City Code, § 18-13-6(a)(2). Unsurprisingly, the mayor ultimately awarded Atwater and Greektown two of the three licenses, and both companies currently operate casinos in Detroit.

II.

An Indian tribe that offers gambling on its Michigan reservation, the Lac Vieux Desert Band of Lake Superior Chippewa Indians, sued because of the obvious handicap it and all other prospective off-reservation operators faced in the Detroit licensing process. Essentially, the Lac Vieux

claims that the ordinance's preference provisions discriminate against it for having not taken Atwater and Greektown's particular political position in the casino legalization debate. According to the Lac Vieux, the ordinance's licensing procedure thus violates the guarantees of the First Amendment as well as of the Fourteenth Amendment's Equal Protection Clause.

In granting Detroit summary judgment on October 31, 1997, the district court held that the Lac Vieux lacked standing to bring its claims and that, even if the Lac Vieux did have standing, the claims lacked merit. The Lac Vieux appealed. We reversed the district court on all these issues, holding in particular that the district court's exceptionally deferential review of the ordinance, considering only whether Detroit conceivably could have had any rational reason to enact it as it had, was inappropriate. *See Lac Vieux Desert Band v. Michigan Gaming Control Board,* 172 F.3d 397, 409 (6th Cir.1999) (*Lac Vieux I*). On remand, the district court purported to demand more of the ordinance but again sustained it. This second appeal followed. Our review of the district court's decision is *de novo. See United States v. Hill,* 167 F.3d 1055, 1063 (6th Cir.1999).

III.

The doctrine of the law of the case requires us to honor the prior rulings of this Court in this litigation. Although we acknowledge that there are limited exceptions to this general principle, we are satisfied that none of them apply now. *See United States v. Todd,* 920 F.2d 399, 403 (6th Cir.1990); *Coal Resources, Inc. v. Gulf & Western Indus., Inc.,* 865 F.2d 761, 767 (6th Cir.1989) (per curiam).

The law of the case here is *Lac Vieux I,* and it establishes three propositions for our purposes: that the Lac Vieux has standing, that the preference provisions restrict First Amendment rights, and that, because the law permits that restriction only on the rarest of occasions, the ordinance is subject to the test commonly known as "strict scrutiny."[1] *See Lac Vieux I,* 172 F.3d at 407, 409-10. All *Lac Vieux I* leaves for us is the test's administration. We start by presuming that the ordinance is unconstitutional. Detroit can overcome that presumption only by proving that the ordinance is necessary to serve a compelling state interest and narrowly drawn to achieve that interest. *See id.* at 409 (citing *R.A.V. v. City of St. Paul,* 505 U.S. 377, 382-83, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992)). In our view, the City is unable to meet this heavy burden. With the preference, the ordinance is fatally unfair, and the casino licenses Detroit has issued to date are illegitimate.

Applying the analytic framework that *Lac Vieux I* sets forth, we first ask whether Detroit can demonstrate that the ordinance serves a *compelling* governmental interest. It can. We accept that the preference promotes the stability of Detroit's political and tax systems, and these interests are indeed compelling under the First Amendment. *See Hernandez v. Commissioner,* 490 U.S. 680, 699, 109 S.Ct. 2136, 104 L.Ed.2d 766 (1989); *Gable v. Patton,* 142

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[1] Under *Lac Vieux I,* the ordinance also implicates the Equal Protection Clause by employing a classification that affects "a constitutionally protected fundamental right, the right to freedom of speech," *Lac Vieux I,* 172 F.3d at 410, but both the district court and the parties now treat this portion of the decision as merely an alternative basis for the application of strict scrutiny, *see id.* (citing *Clark v. Jeter,* 486 U.S. 456, 461, 108 S.Ct. 1910, 100 L.Ed.2d 465 (1988)). We will do the same.

F.3d 940, 947 (6th Cir.1998) (quoting *Storer v. Brown,* 415 U.S. 724, 736, 94 S.Ct. 1274, 39 L.Ed.2d 714 (1974)); *see also Minneapolis Star v. Commissioner,* 460 U.S. 575, 586, 103 S.Ct. 1365, 75 L.Ed.2d 295 (1983) (deeming government interest in raising revenue "critical" while deciding case on other grounds).

Given that the ordinance serves these "compelling" interests in some measure, we next ask if the ordinance is *necessary* in order for the interests to be served at all. Likewise, with regard to the First Amendment problem that *Lac Vieux I* has already decided exists, we look at whether the ordinance is the *least restrictive* possible way of serving those interests. Here, Detroit's arguments become unpersuasive. Were we to agree that the ordinance is theoretically *capable* of ensuring for Detroit a stable political system and a sound tax system, the proper inquiry remains whether those things cannot exist without the current ordinance on the books. Detroit stresses that the City's electorate had rejected proposals that would have legalized casino gaming on five prior occasions, and projects that it would also have rejected this one without some indication of the likelihood that the casinos would be run by, as the district court described Atwater and Greektown, "Detroit businesses who had already invested in the City [and] who had demonstrated their commitment to the revitalization of the City." However, this explanation goes to whether the preference was necessary to getting the ordinance passed, not to whether the preference is necessary to serve Detroit's compelling interests. In any event, the protections of the First Amendment cannot just be wished away, regardless of how much the government might like to do so. Furthermore, Detroit collapses the doctrinally accurate argument of whether the ordinance is

necessary to serve its compelling interests into an argument that casinos themselves are necessary to do so. But Detroit has not demonstrated that its political and economic conditions are yet quite so dire that casinos present their last chance for salvation.

Accordingly, the preference renders the ordinance invalid. Absent the provision, we are confident that Detroit's interests could be served without intruding upon the Lac Vieux's First Amendment rights. The district court apparently decided otherwise because Detroit previously had rejected a means more restrictive than the preference, giving Atwater and Greektown an outright guarantee that casino licenses would be theirs. This was erroneous. As the Lac Vieux has put it, the district court effectively turned this aspect of strict scrutiny "on its head," failing to recognize that Detroit's ordinance must do the least damage to the First Amendment, not just avoid doing the most damage. A less restrictive means of serving the interests Detroit has identified is simply leaving the preference out.

By employing the preference, Detroit basically sought to end the high-stakes competition for two of the three Detroit casino licenses before it really began. This we cannot allow. Barring governments from endorsing or punishing political activity, or the lack of it, is among the paramount functions of the First Amendment's Free Speech Clause. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982) ("[E]xpression on public issues 'has always rested on the highest rung of the hierarchy of First Amendment values.'" (quoting in part *Carey v. Brown*, 447 U.S. 455, 467, 100 S.Ct. 2286, 65 L.Ed.2d 263 (1980))); *see also Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston,*

515 U.S. 557, 573, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995) ("One important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say.'" (quoting in part *Pacific Gas & Electric Co. v. Public Utilities Comm'n of Cal.*, 475 U.S. 1, 16, 106 S.Ct. 903, 89 L.Ed.2d 1 (1986) (plurality opinion))). In this tradition, the decision of the district court is REVERSED and REMANDED for proceedings consistent with this opinion.

O'MALLEY, District Judge, dissenting.

The majority reverses the district court based on two conclusions: (1) the Detroit ordinance is constitutional only if it survives "strict scrutiny;" and (2) the ordinance does not pass this rigorous test. I agree with the second conclusion – as the Supreme Court has noted, "it is the rare case in which . . . a law survives strict scrutiny." *Burson v. Freeman*, 504 U.S. 191, 211, 112 S.Ct. 1846, 119 L.Ed.2d 5 (1992). I do not agree, however, that the ordinance is constitutional only if it survives strict scrutiny analysis. Accordingly, I respectfully dissent.

The majority notes that, in *Lac Vieux I*,[1] a different panel concluded that the preference provisions contained in the ordinance "implicate[ ] the First Amendment." 172 F.3d at 409. I agree with the majority, op. at ___, that this is the law of the case. I do not agree with the majority, however, that it is also the law of the case that the test for constitutionality which the ordinance must survive is strict scrutiny. While the panel in *Lac Vieux I* wrote:

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[1] *Lac Vieux Desert Band v. Michigan Gaming Control Board*, 172 F.3d 397, 409 (6th Cir. 1999).

"[a]lthough the district court and the parties have provided little guidance on the question, *principally because the district court did not reach this issue,* we conclude that the ordinance is content-based and is therefore subject to strict scrutiny," *id.* at 409-10 (emphasis added), that conclusion was gratis dictum. *See Black's Law Dictionary* (7th ed. 1999) (defining gratis dictum as "a court's discussion of points or questions not raised by the record"). In fact, the ruling in *Lac Vieux I* was simply and only that the Lac Vieux tribe had standing to challenge the Detroit ordinance and that such a challenge did "implicate the First Amendment." The statement that, on remand, the district court should apply a strict scrutiny analysis to the Detroit ordinance was not necessary to the panel's ruling.

Of course, the district court would have been unwise to ignore the suggestions made in *Lac Vieux I* on how to proceed. I disagree, however, that this Court is constrained by the law of the case doctrine to follow that same suggestion. As the *Lac Vieux I* panel expressly stated, at that juncture, neither the parties nor the district court had addressed the critical issue of the appropriate level of constitutional review. As noted, the district court below and the parties on appeal in *Lac Vieux I* focused on whether the plaintiff had standing to assert its claims *at all* and whether, if so, those claims were even cognizable under the First Amendment – legal questions that were hotly disputed. To the extent the *Lac Vieux I* panel expressed an opinion on anything beyond those threshold questions, accordingly, it did so without the benefit of briefing, argument, or a lower court decision on the issue. In contrast, the briefing before this panel contains substantial argument regarding the proper constitutional standard to be applied in the circumstances presented

here. I do not believe we should relegate the analysis of this critical question to a one-sentence reference in a prior opinion, out of an unnecessary desire to adhere to the law of case doctrine. Indeed, I do not believe the *Lac Vieux I* panel would feel bound by its own dicta, or expect this panel to be bound by it.

Furthermore, even if *Lac Vieux I* did establish the law of this case to be that the Detroit ordinance must be narrowly drawn to serve a compelling state interest, I still believe we should not be bound by this pronouncement. "A court has the power to revisit prior decisions of its own or of a coordinate court in any circumstance, although as a rule courts should be loathe to do so in the absence of extraordinary circumstances such as where the initial decision was 'clearly erroneous and would work a manifest injustice.'" *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 817, 108 S.Ct. 2166, 100 L.Ed.2d 811 (1988) (quoting *Arizona v. California*, 460 U.S. 605, 618, n. 8, 103 S.Ct. 1382, 75 L.Ed.2d 318 (1983)). I am afraid that, in fact, the pronouncement in *Lac Vieux I* that the ordinance must survive strict scrutiny is clearly erroneous, and that application of this test would work a manifest injustice.

In *Board of County Comm'rs, Wabaunsee Cty., Kansas v. Umbehr*, 518 U.S. 668, 116 S.Ct. 2342, 135 L.Ed.2d 843 (1996), the Supreme Court considered the question of "whether, and to what extent, the First Amendment restricts the freedom of federal, state or local governments to terminate their relationships with independent contractors because of the contractors' speech." *Id.* at 673-74, 116 S.Ct. 2342. Resolving "a conflict between the Courts of Appeals," the Supreme Court held that: (1) the First Amendment does protect independent contractors from

termination of government contracts in retaliation for exercising free speech rights; and (2) "the *Pickering* balancing test, adjusted to weigh the government's interests as contractor rather than as employer, determines the extent of their protection." *Id.* at 673, 116 S.Ct. 2342 (citing *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty., Illinois,* 391 U.S. 563, 568, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968)); *see O'Hare Truck Service, Inc. v. City of Northlake,* 518 U.S. 712, 719, 116 S.Ct. 2353, 135 L.Ed.2d 874 (1996).

The *Pickering* balancing test, in turn, calls for weighing the plaintiff's "right to speak on a matter of public concern against 'the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'" *Hardy v. Jefferson Community College,* 260 F.3d 671, 679-80 (6th Cir.2001) (quoting *Pickering,* 391 U.S. at 568, 88 S.Ct. 1731). And, when measuring the balance, a district court should "deferentially view" the state's "legitimate interests as contractor." *Umbehr,* 518 U.S. at 685, 116 S.Ct. 2342. The likelihood that the Detroit ordinance could pass constitutional muster under this test, of course, is far higher than under the strict scrutiny test.

Indeed, even this *Umbehr/Pickering* balancing test may be too stringent. The Supreme Court in *Umbehr* was careful to note the "limited nature" of its decision, stating that, because the plaintiff's lawsuit "concern[ed] the termination of a *pre-existing commercial relationship* with the government, [the Court did] not address the possibility of suits by bidders or applicants for new government contracts who cannot rely on such a relationship." *Id.* at 685, 116 S.Ct. 2342 (emphasis added). When, as here, there is *not* a pre-existing commercial relationship

between the state and the bidder or applicant for a government contract, the balance falls even more in favor of the state. *See McClintock v. Eichelberger,* 169 F.3d 812, 815-17 (3rd Cir.1999), *cert. denied,* 528 U.S. 876, 120 S.Ct. 182, 145 L.Ed.2d 154 (1999) (noting, in circumstances similar to those presented in this case, that the balancing test called for by *Umbehr* and *O'Hare* was too strict, because the plaintiff did not have a pre-existing, ongoing contractual relationship with the state). In fact, at least one district court has applied *McClintock* and concluded that, when there is "no such ongoing commercial relationship, there is no First Amendment protection and thus in the absence of such a relationship, a cause of action is not recognized for failure to award a contract in retaliation for exercise of one's First Amendment rights." *Halstead v. Motorcycle Safety Foundation Inc.,* 71 F.Supp.2d 464, 473-74 (E.D.Pa.1999).

Laudably, the panel in *Lac Vieux I* tried to give the district court some guidance on how to measure the constitutionality of the Detroit ordinance. As the panel admitted, however, "the district court and the parties have provided [us with] little guidance on the question" of the correct standard of constitutional review. *Lac Vieux I,* 172 F.3d at 409. Indeed, in the absence of this guidance, the *Lac Vieux I* panel looked to cases involving criminal ordinances restricting speech, rather than to *Umbehr* or *O'Hare,* when it suggested the appropriate level of review. *Id.* at 409-10 (citing *R.A.V. v. City of St. Paul, Minn.,* 505 U.S. 377, 382-383, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992), in which a criminal defendant challenged an ordinance prohibiting bias-motivated disorderly conduct, and *Frisby v. Schultz,* 487 U.S. 474, 481, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988), in which abortion protestors challenged an

ordinance prohibiting picketing near an individual dwelling).

On remand, the district court struggled to reconcile the panel's reference to strict scrutiny with the Supreme Court's recognition in *Umbehr* and *O'Hare* of the circumscribed nature of the right at issue in these circumstances. The district court did so by finding that the right rested at the fringes of any strict scrutiny concern and that the level of review should be more deferential to the state than normally required when strict scrutiny applies. While as the majority concludes, that approach may be inappropriate, it is understandable given the obvious tension between the strict scrutiny reference in *Lac Vieux I* and the Supreme Court's contrary holdings in *Umbehr* and *O'Hare*.

While the majority is correct that strict scrutiny is not flexible enough to support the district court's conclusion on remand, I believe that, by accepting strict scrutiny as the standard to be applied in this case, the majority is committing error and forcing a manifest injustice on the parties. Even worse, I am not at all clear precisely what that injustice might be; the majority opinion does not explain what the district court should actually do, now, on remand. Should it "determine whether the offending provisions are severable from the remainder of the ordinance?" *Lac Vieux I,* 172 F.3d at 410. Revoke the appellees' licenses? Require the existing multi-million dollar casinos be razed? Hold a trial to measure damages? Hold a trial to determine if the appellant would have secured a license?[2]

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[2] The *Lac Vieux I* panel concluded that the appellant had carried its *"burden on summary judgment"* of showing it was "ready and able to

(Continued on following page)

With all due respect to the panel in *Lac Vieux I,* and to my co-jurists in the majority who feel bound by *Lac Vieux I,* I believe the standard of constitutional review employed in this case is incorrect. To adopt it puts us at odds with binding Supreme Court precedent and our sister Circuit Courts of Appeals. *See, e.g., McClintock,* 169 F.3d at 815-17; *Shahar v. Bowers,* 114 F.3d 1097, 1102-03 (11th Cir.1997) (en banc), *cert denied,* 522 U.S. 1049, 118 S.Ct. 693, 139 L.Ed.2d 638 (1998) ("the [*Umbehr*] Court held that government contractors are protected from termination or failure to renew their contracts for exercising their free speech rights and that the *Pickering* balancing test is the appropriate standard for determining whether a First Amendment violation has occurred"). Indeed, it puts us at odds with prior opinions of this very Court. *See, e.g., Thaddeus-X v. Blatter,* 175 F.3d 378, 392 (6th Cir.1999) (noting that the *Pickering/Umbehr* test has been "applied in a variety of First Amendment settings," including even "the prison context").

Accordingly, I dissent, and suggest that this issue might be suitable for further review.

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submit a proposal and that it was willing and able to pay the associated fees." 172 F.3d at 406 (emphasis added). In other words, there existed material questions of fact regarding whether the tribe was ready, willing, and able timely to do what was required to obtain a license. Appellees argue – correctly, it appears to me – that they could still prevail on all pending claims *at trial* if they prove that, in fact, the appellant was *not* ready, willing, and able to meet these requirements.

172 F.3d 397
1999 Fed. App. 0132P

United States Court of Appeals,
Sixth Circuit.

LAC VIEUX DESERT BAND OF LAKE SUPERIOR CHIPPEWA INDIANS, Plaintiff-Appellant,

v.

The MICHIGAN GAMING CONTROL BOARD, et al., Defendants-Appellees, Atwater Entertainment Associates, L.L.C.; Greektown Casino, L.L.C.; State of Michigan; Frank J. Kelley, Attorney General ex rel the People of the State of Michigan, Intervenors-Appellees.

No. 97-2249.

Argued Dec. 9, 1998.
Decided April 12, 1999.

John M. Peebles (briefed), *Conly J. Schulte* (briefed), Monteau, Peebles & Evans, Omaha, Nebraska, *G. Michael Fenner* (argued and briefed), Creighton University School Of Law, Omaha, Nebraska, for Plaintiff-Appellant.

John M. Cahill (argued and briefed), Assistant Attorney General, Casino Control Division, Lansing, Michigan, for Defendants-Appellees Michigan Gaming Control Board, Thomas Denomme, Michael Stacey, Paula Blanchard.

Morley Witus (briefed), Barris, Sott, Denn & Driker, Detroit, Michigan, for Defendant-Appellee City of Detroit.

John D. Pirich (argued and briefed), *John S. Kane*, Honigman, Miller, Schwartz & Cohn, Lansing, Michigan, for Intervenor-Appellee Atwater Entertainment Associates, L.L.C.

Bruce R. Greene (briefed), Greene, Meyer & McElroy, Boulder, Colorado, for Intervenor-Appellee Greektown Casino, L.L.C.

Thomas R. Wheeker (briefed), Office of the Attorney General, Tort Defense Division, Lansing, Michigan, for Intervenor-Appellee Frank J. Kelley.

Before: *NELSON*, *SILER*, and *DAUGHTREY*, Circuit Judges.

DAUGHTREY, Circuit Judge.

The Lac Vieux Desert Band of Lake Superior Chippewa Indians brought this action, challenging a Michigan state statute and a Detroit city ordinance that govern the development and regulation of casino gambling in Detroit. The plaintiff asserts that both the statute and the ordinance award an unconstitutional preference in the development of casino gambling to two particular parties, Atwater Entertainment and Greektown Casino (intervenors in this case). On appeal, Lac Vieux contests the district court's grant of summary judgment to the defendants on three grounds, contending (1) that the district court erred in determining that Lac Vieux lacked standing to bring its First Amendment and equal protection claims; (2) that the district court erred in determining that the First Amendment is not implicated in this case; and (3) that the district court erred in applying rational basis review in determining the merits of the equal protection claim. We conclude that the district court did err in determining that Lac Vieux lacks standing to challenge the Detroit ordinance, in determining that the First Amendment is not implicated in that legislation, and in applying rational basis review in determining the merits of the equal protection claim. The district court was correct,

however, in holding that the plaintiff lacks standing to challenge the state statute. We therefore affirm the judgment of the district court in part, reverse it in part, and remand the case to the district court for further proceedings.

PROCEDURAL AND FACTUAL BACKGROUND

The Lac Vieux Desert Band of Lake Superior Chippewa Indians is a federally recognized Indian tribe that operates a casino on its reservation in Gogebic County, Michigan. In 1994, Lac Vieux, in conjunction with several partners, developed a plan to establish a casino in downtown Detroit. At that time, however, off-reservation gambling was not legal in the state of Michigan, and the governor of Michigan declined to approve the project.

Atwater Entertainment and Greektown Casino also proposed to bring gambling to Detroit. In 1994, they secured sufficient signatures to place on the city ballot two ordinance initiatives that, in conjunction, would repeal the prohibition against casino gambling within the city and authorize Atwater Entertainment and Greektown Casino to conduct casino gambling there. They each spent substantial sums of money to promote passage of the initiatives. Detroit voters approved the initiatives in August 1994, but development of casino gambling was still prevented by Michigan state law.

Atwater Entertainment and Greektown Casino subsequently sponsored a state ballot proposal, Proposal E, which provided for an initiated law, the Michigan Gaming Control and Revenue Act, designed to change state law to allow casino gaming in Detroit. Again, they each devoted substantial sums of money to advertise and

promote the adoption of Proposal E, which was adopted by the Michigan electorate on November 5, 1996, and was codified as Mich. Comp. Laws §§ 432.201, *et seq.*

The initiated act authorized the development and operation of casino projects in Michigan cities where:

> (1) the city has a population of at least 800,000 at the time a license is issued;
>
> (2) the city is located within 100 miles of any other state or country in which gaming is permitted; and
>
> (3) a majority of the voters of the local unit of government have expressed approval of casino gaming in the city.

Mich. Comp. Laws § 432.202(f). Detroit is the only city that met these criteria. The initiated act also created the defendant Michigan Gaming Control Board and granted this body exclusive authority to authorize state licenses to operate casinos. *See* Mich. Comp. Laws §§ 432.204(a), 432.205-432.208.

Section 432.206(a)(1) of the initiated act provided an exemption from the competitive bidding process at the city level for any license applicant who "was the initiator of any casino gaming proposal submitted for voter approval in the city in which the casino will be located and the voters approved the proposal." Mich. Comp. Laws § 432.206(a)(1). Section 432.206(a)(3) provided that an applicant must have entered into a development agreement with the city in order to be eligible for a casino license. *See* Mich. Comp. Laws § 432.206(a)(3). Section 432.206(b) limited the number of licenses that the Board

could grant and provided for further preferential treatment in the licensing process:

> No more than three (3) licenses shall be issued by the board in any city. In the event that more than three (3) applicants meet the criteria provided for in Section 6(a) of this Act, licenses shall first be issued to applicants which submitted any casino gaming proposal for voter approval prior to January 1, 1995, in the city in which the casino will be located and the voters approved the proposal.

Mich. Comp. Laws § 432.206(b). Atwater Entertainment and Greektown Casino were the only entities eligible for both the exemption from competitive bidding and the preference over other applicants.

Lac Vieux initiated this suit against the Board, the City of Detroit, the Mayor, and City Counsel members in February 1997, seeking to have the initiated act declared unconstitutional on the grounds that it impaired an exclusive contractual right; that it violated the takings, equal protection, and due process clauses of the federal and Michigan constitutions; that it violated the state constitution's prohibition against special legislation; and that it constituted an unlawful delegation of legislative authority to the City of Detroit. Atwater Entertainment, Greektown Casino, and the Michigan Attorney General successfully sought to intervene in the case in May 1997.

In the meantime, in order to implement the initiated act, the Detroit City Council adopted an ordinance entitled the Casino Development Competitive Selection Process, which is now codified as Detroit City Code §§ 18-13-1 *et seq.* This June 1997 ordinance authorizes the Mayor to select three developers to enter into casino development

agreements with the city, and it sets forth the criteria by which these developers must be chosen. *See* Detroit City Code, §§ 18-13-3; 18-13-5. The City Council must review and approve proposed development agreements. *See* Detroit City Code, § 18-13-8.

The ordinance's Statement of Intent indicates that "[i]n selecting developers of casinos, it is in the best interest of the City to provide a preference to those developers who took the initiative to facilitate the development of casino gaming in the City of Detroit by proposing a casino gaming proposal approved by the voters of the City (City Ordinances 15-94 and 16-94), and who actively promoted and significantly supported the State initiative authorizing gaming." Detroit City Code, § 18-13-1. This preference is laid out even more fully in Section 18-13-6, which provides in part that:

> (a) In considering proposals and in selecting a prospective developer with whom the Mayor or his designee will negotiate a development agreement, a prospective developer is entitled to a preference if:
>
> (1) its proposal meets the criteria established by this Chapter and by the request for proposals;
>
> (2) it was the initiator of a casino gaming proposal which was approved by the voters of this City prior to January 1, 1995; and
>
> (3) it made significant contributions to the development of gaming within the City by actively promoting and significantly supporting a state initiative authorizing gaming.

Detroit City Code, § 18-13-6. If a developer meets these criteria, then the developer will receive a "more favorable

position" in the competitive bidding process. Detroit City Code, § 18-13-2. Greektown Casino and Atwater Entertainment are the only developers who could qualify for this preference.

On June 23, 1997, the City of Detroit published the Phase I Request for Proposals and Qualifications pursuant to the ordinance. Detailed proposals and a $50,000 Phase I fee were to be submitted by August 1, 1997. Eleven developers, including Atwater Entertainment and Greektown Casino, submitted timely proposals. Lac Vieux declined to submit a proposal. On August 22, 1997, the Mayor invited seven developers to submit Phase II proposals along with the $250,000 Phase II fee. On November 20, 1997, subsequent to the filing of the district court's opinion, the Mayor announced that MGM Grand-Detroit, Greektown Casino, and Detroit Entertainment (Atwater Entertainment/ Circus Circus) had been selected.

In the meantime, while the developer selection process was being conducted by the City of Detroit, the state legislature voted to amend Proposal E. The governor signed the amendments into law on July 17, 1997. The amended act restates the criteria that an applicant must meet in order to be eligible to apply for a casino license. As under the initiated act, these criteria include the requirement that an applicant must have "entered into a certified development agreement with the city where the local legislative body enacted an ordinance approving casino gambling." Mich. Comp. Laws § 432.206(1)(b). However, under the Amended act:

> A city shall not certify or submit and have pending before the board more than 3 certified development agreements. If an applicant is denied a casino license by the board, the city may then

> certify a development agreement with another applicant and submit the certified development agreement to the board. Nothing in this act shall be construed to prevent the city from entering into more than 3 development agreements.

Mich. Comp. Laws § 432.206(2). Furthermore, the amended act provides:

> No more than three (3) licenses shall be issued by the board in any city. . . . In evaluating the eligibility and suitability of all applicants under the standards provided in this act, the board shall establish and apply the standards to all applicants in a consistent and uniform manner. In the event that more than three (3) applicants meet the standards for eligibility and suitability provided for in subsections (4) and (5), licenses shall first be issued to those eligible and suitable applicants which submitted any casino gaming proposal for voter approval prior to January 1, 1995, in the city in which the casino will be located and the voters approved the proposal.

Mich. Comp. Laws § 432.206(3).

Thereafter, Lac Vieux twice amended its complaint. The first amendment addressed the amended act and the ordinance, both of which had been passed subsequent to the filing of the original complaint. In the second amended complaint, Lac Vieux withdrew its due process challenge to the amended act, as well as the claim that the amended act constituted unlawful delegation of legislative authority. However, the amended complaint set out new First Amendment claims: it alleged that both the amended act and the ordinance violate the free speech and freedom of association clause of the First Amendment to the federal constitution, by awarding preferences to parties "for their

political support of a particular side of a controversial political issue." Following the filing of the second amended complaint, the issues before the district court were, as summarized by that court:

> (1) that the Amended act impairs the exclusive contractual right of [Lac Vieux] to operate Class III games of chance in Michigan; (2) that the Amended act destroyed the exclusive right and constitutes a taking in violation of the United States and Michigan Constitutions; (3) that the preferential treatment given to Atwater Entertainment and Greektown in the Amended act constitutes a denial of [Lac Vieux's] right to the equal protection of the laws of the state of Michigan; (4) that the preferences in the Amended act violate the prohibition against special legislation found in Article IV § 29 of the Michigan Constitution; (5) that the preferential treatment given to Atwater Entertainment and Greektown in the Ordinance violates [Lac Vieux's] right to equal protection of the laws of the state of Michigan; (6) that the Ordinance deprives [Lac Vieux] of property without due process of law; (7) that the preference in the Ordinance violates the prohibition against special legislation found in Article § 29 of the Michigan Constitution; (8) that the preferences found in the Amended act violate the free speech and political association clause of the First Amendment; [and] (9) that the Ordinance violates the free speech and political association clause of the First Amendment.

Subsequently, the district court denied Lac Vieux's motion for summary judgment and granted the motions for summary judgment submitted by the defendants and the intervenors. The district court held that Lac Vieux did

not have an exclusive right to operate that would support its contracts, takings, and due process claims, and that it lacked standing to bring its remaining claims, including the First Amendment and equal protection claims. Despite its finding that Lac Vieux lacked standing to bring these claims, the district court found that the First Amendment is not implicated in this case, that the equal protection claims did not survive rational basis review, and that the special legislation claims were meritless. The only issues now raised on appeal are the standing decision and the First Amendment and equal protection claims.

DISCUSSION

I. Standing

Lac Vieux alleges that the district court erred in finding that it lacked standing to assert both its First Amendment and equal protection claims. "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues. This inquiry involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." *Warth v. Seldin,* 422 U.S. 490, 498, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). Constitutional limitations on standing require that there must be an actual case or controversy. *See Pestrak v. Ohio Elections Comm'n,* 926 F.2d 573, 576 (6th Cir. 1991). The Supreme Court set forth the elements necessary for there to be a "case or controversy" in *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992), as follows:

> [T]he irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an injury in fact – an

> invasion of a legally-protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of. . . . Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Id. at 560-61, 112 S.Ct. 2130 (internal quotation marks and citations omitted). Prudential limitations dictate that "the plaintiff must be a proper proponent, and the action a proper vehicle, to vindicate the rights asserted." *Pestrak,* 926 F.2d at 576.

A. Standing to Bring Equal Protection Claim

1. The Detroit Ordinance

The district court held that Lac Vieux does not have standing to bring its equal protection claim because it has failed to show that it suffered an injury in fact. Specifically, the court held, the plaintiff did not sufficiently allege that it was "ready and able" to submit a proposal in the City of Detroit's competitive bidding process. On appeal, Lac Vieux argues that the district court erred in determining that it was not ready and able, misapplied *Associated General Contractors of America v. City of Jacksonville,* 508 U.S. 656, 113 S.Ct. 2297, 124 L.Ed.2d 586 (1993), and ignored crucial evidence. We agree.

In *Associated General,* an association of general contractors challenged an ordinance that awarded preferential treatment to minority business enterprises. The Eleventh Circuit held that the association lacked standing because it did not allege that any of its members would

have been awarded a contract but for the challenged ordinance, leading the court to conclude that there was no injury in fact. *Id.* at 664, 113 S.Ct. 2297. The Supreme Court reversed the Court of Appeals, holding that:

> When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The "injury in fact" in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of a barrier, not the ultimate inability to obtain the benefit. . . . [I]n the context of a challenge to a set-aside program, the "injury in fact" is the inability to compete on an equal footing in the bidding process, not the loss of a contract.

Id. at 666, 113 S.Ct. 2297. The Court therefore held that in order to establish standing, "a party challenging a set-aside program like Jacksonville's need only demonstrate that it is *able and ready* to bid on contracts and that a discriminatory policy prevents it from doing so on an equal basis." *Id.* (emphasis added). Although this case does not involve a strict set-aside program like that in *Associated General,* the principles set forth in *Associated General* are applicable. Therefore, as the district court correctly noted, "the standing issue hinges on whether [Lac Vieux] has sufficiently alleged that it is able and ready to bid for a casino license."

Lac Vieux claims it has a demonstrated history of participating in casino development projects and was

ready and able to submit a bid. The second amended complaint states:

> 22. [Lac Vieux] has arranged for the development of major casino resort development projects in the State of Michigan, including a project in conjunction with Full House Resorts, Inc., and GTECH Corporation for the development of a casino resort project in downtown Detroit, Michigan, which included a development in excess of two million (2,000,000) square feet of the former Hudson's Department Store, at a projected cost of Two Hundred Million Dollars ($200,000,000) to Three Hundred Million Dollars ($300,000,000). In addition, [Lac Vieux] has executed the development, finance and construction of a multi-million dollar casino, hotel, fine dining, and golf resort that the Tribe currently owns and operates on its Reservation in Gogebic County, Michigan.
>
> 23. At all times relevant herein, [Lac Vieux] has been ready and has had the ability to submit the requisite information for a casino development proposal in accordance with the Request for Proposals/Qualifications issued by the City of Detroit on June 23, 1997, and Section 18-13-1 through 18-13-11 of the Detroit City Code.

However, the district court held that Lac Vieux had *not* sufficiently alleged that it is ready and able to submit a proposal to the City of Detroit. The district court relied on the fact that the earlier attempt to establish a casino in Detroit had not gone through, that Lac Vieux had partners in that earlier endeavor, that Lac Vieux's experience with its own casino did not demonstrate an ability to address the many requirements of a competitive proposal, that Lac Vieux did not submit a proposal for the court's review, that Lac Vieux had not shown how it would address proposal

requirements such as financial stability and compulsive gambling, and that Lac Vieux had not demonstrated a willingness or ability to pay the fees associated with submitting a proposal. We conclude that this analysis was faulty for several reasons.

First, the district court's analysis indicates a misunderstanding of what a plaintiff must show in order to prove that it is "ready and able" to submit a proposal as required by *Associated General.* The grounds relied upon by the district court are evidence of whether a proposal that Lac Vieux might have submitted would ultimately have been successful. They are not indicative of whether Lac Vieux had the capability simply *to submit* a proposal. Under *Associated General,* Lac Vieux "need not allege that [it] would have obtained the benefit but for the barrier in order to establish standing." *Associated General,* 508 U.S. at 666, 113 S.Ct. 2297. Lac Vieux therefore need not allege that it would have been awarded a contract but for the preferential and thereby allegedly unconstitutional selection process, but only that it was capable of submitting a proposal. Although the district court did state that it had "not required [Lac Vieux] to show that it would have been selected, rather [Lac Vieux] has only been required to show that [sic] is ready and able to submit the proposal in question," the court's analysis belies this assertion.

Second, the district court's finding that Lac Vieux's assertion that it was ready and able to submit a proposal to the City of Detroit "is merely a conclusion without any evidentiary support," is simply incorrect, as is the court's finding that Lac Vieux has not demonstrated a willingness or ability to pay the fees associated with submitting a proposal. The record includes an affidavit by Tom Kolinsky, the Executive Director for the Lac Vieux Desert

Band of Lake Superior Chippewa Indians, submitted as an exhibit to Lac Vieux's brief in support of its motion for summary judgment, in which Kolinsky testifies that based upon his knowledge of Lac Vieux's financial and other resources, and based upon his personal knowledge of the position of the Tribal Council:

> a. At all times relevant herein, the *Tribe was, and is, ready, and has the ability to submit a proposal* in accordance with the Development Ordinance and Request for Proposals/ Qualifications issued by the City of Detroit on June 23, 1997, containing all the information requested therein, including, but not limited to: the Tribe's background and experience in the operation of a casino; a plan for a design for a casino which is compatible with the City of Detroit; a plan for economic development for the City of Detroit; a plan that addresses the necessary infrastructure improvements associated with a casino development in the City of Detroit; a plan for dealing with social issues related to gambling associated with a development of a casino in Detroit, Michigan, and the Tribe's financial strength and backing.
>
> b. *The Tribe has adequate financial resources to pay the fees* required in connection with the selection process contained in the Phase I Request for Proposals/Qualifications and Phase II Request for Proposals/Qualifications, including the Fifty Thousand Dollar ($50,000) fee to be submitted by Phase I proposers in connection with submitting a Phase I proposal and a Two Hundred Thousand Dollar ($250,000) fee to be paid by Phase II proposers in connection with submitting their Phase II proposals.

> c. *But for the preferential treatment* given to Atwater Entertainment and Greektown in the Amended Act and Development Ordinance, [*Lac Vieux] would have submitted a proposal* for a casino development project in the City of Detroit.

(Emphasis added.) Given that these facts are not contradicted by any evidence presented by the defendants or the intervenors, we conclude that this affidavit is sufficient to meet the plaintiff's burden on summary judgment. The evidence shows that Lac Vieux was ready and able to submit a proposal and that it was willing and able to pay the associated fees.

Finally, the district court seemed to be under the impression that in order for Lac Vieux to meet *Associated General's* "ready and able" requirement, it must be able and ready to submit a proposal *immediately.* The district court suggested, for example, that Lac Vieux should have submitted a proposal for the district court's review. Although such a submission would certainly have established that Lac Vieux was able and ready to submit a proposal, it was not mandatory. The parties agree that it would require substantial time and expense to prepare the type of proposal foreseen by the Phase I Request for Proposals and Qualifications, no less by Phase II. The law recognizes, however, that a plaintiff need not make costly futile gestures simply to establish standing, particularly when the First Amendment is implicated. *See, e.g., Virginia v. American Booksellers Ass'n, Inc.,* 484 U.S. 383, 392-93, 108 S.Ct. 636, 98 L.Ed.2d 782 (1988) (holding that injury in fact was established where plaintiffs would have had to take "significant and costly compliance measures or risk criminal prosecution" if their interpretation of the statute is correct); *Clements v. Fashing,* 457 U.S. 957, 962,

102 S.Ct. 2836, 73 L.Ed.2d 508 (1982) (holding that there was a case or controversy where plaintiffs "alleged in a precise manner that, but for the sanctions of the constitutional provision they seek to challenge, they would engage in the very acts that would trigger the enforcement of the provision"). It is therefore sufficient that Lac Vieux has shown that it could have submitted a timely proposal and that it was still ready to do so, should the preference be struck down and the bidding process started over.

For all these reasons, we conclude that Lac Vieux has standing to bring its equal protection claim in regard to the city ordinance.

2. The Amended Act

The district court did not address Lac Vieux's standing to bring an equal protection claim against the amended act as a separate issue from Lac Vieux's standing to bring an equal protection claim against the city ordinance. Although the same principles governing standing to challenge the ordinance would apply to an equal protection claim against the amended act, it is not necessary to go through that analysis here because the amended act appears to render the preference ineffective. If the preference is ineffective, then there can be no injury and no "case or controversy." Although Lac Vieux attempts to rebut the defendants' and the intervenors' contention that the preference is ineffective, we find its argument neither fully developed nor convincing. We therefore hold that because the preference in the amended act is ineffective, Lac Vieux does not have standing to bring an equal protection challenge to the amended act.

B. Standing to Bring First Amendment Claim

1. The Detroit Ordinance

Lac Vieux presents a facial challenge to the city ordinance and the amended act on the basis that they grant preferences to particular entities as a reward for content-based political speech. Lac Vieux asserts that under the standing principles set forth in *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 755-56, 108 S.Ct. 2138, 100 L.Ed.2d 771 (1988), and other First Amendment cases, it need not have participated in the competitive bidding process to bring a facial challenge. The defendants and intervenors disagree and argue that the First Amendment is not implicated. Furthermore, they argue that even if the First Amendment is implicated, the principles enunciated in *Plain Dealer* do not apply in this case and that a facial challenge is inappropriate. The district court found that neither the act nor the ordinance implicates the First Amendment and therefore did not address standing in the First Amendment context, concentrating instead on Lac Vieux's standing to bring its equal protection claim. We conclude that this is indeed a First Amendment case, and we therefore find it necessary to address the standing issue as it applies in the First Amendment context separately from Lac Vieux's standing to bring its equal protection claim.

"In the First Amendment arena . . . especially when there is a possibility that, rather than risk punishment for his conduct in challenging the statute, [an individual] will refrain from engaging further in the protected activity, courts have been willing to relax prudential standing limitations and permit a third party to assert the rights of a person not otherwise before the court. Even in such situations, however, a court must still consider whether

the third party has sufficient injury-in-fact to satisfy the Art[icle] III . case-or-controversy requirement." *Greater Cincinnati Coalition for the Homeless v. City of Cincinnati,* 56 F.3d 710, 718 (6th Cir. 1995) (internal quotes and citations omitted). Lac Vieux has standing to bring a First Amendment claim because it established the elements set forth in *Lujan* as necessary to show a "case or controversy" and overcome constitutional limitations on standing. As discussed above in the context of Lac Vieux's equal protection claim, Lac Vieux's injury in fact is the disadvantage it faced in the bidding process because it did not support a particular side of a particular political issue.

Furthermore, given the First Amendment context here, a facial challenge is appropriate, and any need for Lac Vieux to participate in the allegedly unconstitutional bidding process in order to establish standing is obviated. *See Plain Dealer,* 486 U.S. at 755-56, 108 S.Ct. 2138 ("[W]hen a licensing statute allegedly vests unbridled discretion in a government official over whether to permit or deny expressive activity, one who is subject to the law may challenge it facially without the necessity of first applying for, and being denied, a license."). The case now before us does not involve the typical licensing scheme envisioned by the Court in *Plain Dealer,* but it is certainly analogous and, therefore, helpful to our analysis. Although typical licensing schemes often involve prior restraint, which in its common form is not an issue in this case, both licensing regulations and the legislation before this court impose a burden on certain individuals or entities based on the content of their speech. It is this type of burden – a burden that is based on the content of one's speech and, thus, may have a chilling effect on that speech – with

which the Supreme Court in *Plain Dealer* was particularly concerned:

> [W]e have previously identified two major First Amendment risks associated with unbridled licensing schemes. [One of those is] self-censorship by speakers in order to avoid being denied a license to speak. . . . It is when statutes threaten these risks to a significant degree that courts must entertain an immediate facial attack on the law. Therefore, *a facial challenge lies whenever a licensing law gives a government official or agency substantial power to discriminate based on the content or viewpoint of speech* by suppressing disfavored speech or disliked speakers.

Id. at 759, 108 S.Ct. 2138 (emphasis added).

The ordinance does create a substantial risk that parties will self-censor, thereby chilling speech. In this case the "chilling effect" arises because the statute limits the ability of persons or entities to take a particular political position freely, whether that position may be to support or to oppose a particular proposal or to remain neutral, without fear of being burdened in a subsequent bidding process for having supported the wrong side, or even for having supported *no* side of the given issue. The Court found in *Plain Dealer* that a facial attack is appropriate and a plaintiff need not actually participate in the licensing or selection process when this type of chilling effect arises.

Furthermore, the city ordinance does "give[ ] a government official or agency substantial power to discriminate based on the content or viewpoint of speech by suppressing disfavored speech or disliked speakers." *Id.* Pursuant to the ordinance, the Mayor and the City

Counsel must grant a preference to certain entities because those entities took a particular view on a political issue. These officials not only have the "power" to discriminate based on the viewpoint of political speech, they are required to do so by law.

We conclude that the principle established in *Plain Dealer* in the context of licensing laws, that a facial challenge should lie when a "law gives a government official or agency substantial power to discriminate based on the content or viewpoint of speech by suppressing disfavored speech or disliked speakers," *id.*, also applies in this context, where the statute grants a preference to certain entities because they took a particular view on a particular political issue. Therefore, a facial challenge is appropriate in this case, and the fact that Lac Vieux did not actually participate in the competitive bidding process is not an obstacle to establishing standing.

In addition, prudential concerns also dictate that the court should hold that Lac Vieux has standing to bring a facial First Amendment challenge to the city ordinance. This legislation would award lucrative contracts pursuant to a statute that explicitly provides preferences to entities that provided political support for that statute. Were we to affirm the decision below without granting standing and addressing the merits, it is likely that no other party would have standing to challenge the ordinance, and the decision below could be interpreted to stand for the proposition that this type of legislation is constitutional.

We therefore hold that Lac Vieux does have standing to bring a facial First Amendment challenge to the ordinance because it was disadvantaged in the bidding process and therefore chose not to participate.

2. The Amended Act

As we noted above in discussing standing in the equal protection context, the language of the amended act seems to render the preference ineffective. Of course, if the preference is ineffective, then there is no injury. Again, we are obligated to recognize that Lac Vieux does not have standing to bring a First Amendment challenge to the amended act. The district court's ruling on this question was therefore correct, if not its reasoning.

II. First Amendment

Lac Vieux argues that the district court erred in finding that the First Amendment is not implicated in this case. Lac Vieux contends that the city ordinance rewarded Atwater Entertainment and Greektown Casino for having engaged in political speech and burdened all other developers for having taken a different political position or for not speaking at all.[1] The defendants and intervenors argue that the preferences embedded in the ordinance are "merely economic incentive provisions," and that they do not implicate the First Amendment.

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[1] The district court's opinion significantly misconstrues Lac Vieux's First Amendment claim. The district court's opinion states that "Lac Vieux appears to allege that it fought against gambling in Detroit" and the district court's analysis relies heavily on the fact that this claim is not supported in the record. The court notes that the record does not indicate "a specific or general opposition" to the initiatives by Lac Vieux, and therefore concludes that there is "no basis in the record for saying that [Lac Vieux] was discriminated [sic] based upon its political viewpoint or speech." In fact, Lac Vieux contends that it was discriminated against not for opposing the initiative but for failing to actively promote or significantly support the initiatives.

The law is clear that a regulation, such as the city ordinance at issue here, may implicate the First Amendment even if the regulation does not directly prohibit or limit speech. *See Laird v. Tatum,* 408 U.S. 1, 11, 92 S.Ct. 2318, 33 L.Ed.2d 154 (1972) ("[C]onstitutional violations may arise from the deterrent, or 'chilling,' effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights."). Furthermore, the government "may not deny a benefit to a person on a basis that infringes his constitutionality [sic] protected interests – especially his interest in freedom of speech." *Perry v. Sindermann,* 408 U.S. 593, 597, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972). This principle has recently been reaffirmed by the Supreme Court in *O'Hare Truck Service, Inc. v. City of Northlake,* 518 U.S. 712, 116 S.Ct. 2353, 135 L.Ed.2d 874 (1996), and *Board of County Comm'rs v. Umbehr,* 518 U.S. 668, 116 S.Ct. 2342, 135 L.Ed.2d 843 (1996).

Although the city ordinance in this case does not directly prohibit or limit speech, it does implicate the First Amendment. The ordinance grants benefits and imposes burdens according to whether an individual or entity sufficiently supported a particular political issue. Specifically, it grants a preference to developers who initiated a prior local casino gaming proposal and "actively promot[ed] and significantly support[ed] a state initiative authorizing gaming."[2] Detroit City Code § 18-13-6. The

[2] This preference comes into play three times in the course of the competitive bidding process: during the design of the Request for Proposals by the City, during the Mayor's evaluation of the proposals, and during the city council's review of the mayor's determination.

ordinance thereby denies a preference in the bidding process to certain developers on the basis of the content of their political speech, a category of speech which has been specifically recognized by the Supreme Court as particularly valuable and thereby carefully protected. *See, e.g., Buckley v. Valeo,* 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976). It does not matter that the ordinance involves prior speech rather than prospective speech or a preference rather than a guarantee, because it imposes a burden based on the content of political speech and, therefore, implicates the First Amendment.

The First Amendment does not, however, preclude all regulation of speech. The right to free speech must be weighed against government and public interests. The appropriate test to be applied in conducting this balancing depends on the type of regulation at issue. When speech is regulated because of its content, that regulation will be subject to strict scrutiny review, unless the speech falls within certain unprotected categories of speech. *See R.A.V. v. City of St. Paul,* 505 U.S. 377, 382-383, 403, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992). Under strict scrutiny review, the government bears the burden of showing that its regulation is "necessary to serve a compelling state interest" and that it is "narrowly drawn to achieve that end." *Id.* By contrast, when the regulation in question is intended to further some other interest, and only incidentally interferes with free speech or free expression, the regulation will be subject to a lesser standard of review. Time, place, and manner restrictions, for example, would fall within this second category of regulation. *See Frisby v. Schultz,* 487 U.S. 474, 481, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988) (quoting *Perry Local Educators' Assn.,* 460 U.S. 37, 45, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983)).

Although the district court and the parties have provided little guidance on the question, principally because the district court did not reach this issue, we conclude that the ordinance is content-based and is therefore subject to strict scrutiny. The government must therefore show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. Precisely because the district court found that the First Amendment was not implicated and never reached this level of analysis, the defendants have not had the opportunity to make a showing that this regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end. We therefore remand this case to the district court for further proceedings. We note that if the preference provisions are held to be unconstitutional, the district court will need to determine whether the offending provisions are severable from the remainder of the ordinance.

III. Equal Protection

Lac Vieux claims that the ordinance, by awarding preferential treatment to Atwater Entertainment and Greektown Casino because of the content of their political speech, denies Lac Vieux the equal protection of the laws of Michigan, in violation of the Fourteen Amendment to the United States Constitution and Article I, Section 2 of the Constitution of the State of Michigan. On appeal, Lac Vieux alleges that the district court erred in applying rational basis review in determining the merits of the equal protection claim.

A statute challenged on equal protection grounds will be subject to strict scrutiny when the statute involves a

"suspect" classification or has an impact on a "fundamental" right. *See Clark v. Jeter,* 486 U.S. 456, 461, 108 S.Ct. 1910, 100 L.Ed.2d 465 (1988) ("Classifications based on race or national origin and classifications affecting fundamental rights are given the most exacting scrutiny."). If the statute does not involve a suspect classification or affect a fundamental right, then it will be subject to rational basis review. *See Heller v. Doe,* 509 U.S. 312, 319-20, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993) ("[A] classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity. Such a classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose.").

The district court found that the ordinance did not implicate the First Amendment, or any other fundamental right for that matter, and therefore applied rational basis review. However, in view of our holding that the ordinance does affect rights under the First Amendment, it follows that it is subject to strict scrutiny review – because it implicates a constitutionally protected fundamental right, the right to freedom of speech. *See Carey v. Brown,* 447 U.S. 455, 461-62, 100 S.Ct. 2286, 65 L.Ed.2d 263 (1980) ("When government regulation discriminates among speech-related activities in a public forum, the Equal Protection Clause mandates that the legislation be finely tailored to serve substantial state interests, and the justifications offered for any distinctions it draws must be carefully scrutinized."); *Chicago v. Mosley,* 408 U.S. 92, 99, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972) ("Because picketing plainly involves expressive conduct within the protection of the First Amendment, discriminations among pickets

must be tailored to serve a substantial governmental interest."); *Williams v. Rhodes,* 393 U.S. 23, 31, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968) ("'[O]nly a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms.'") (quoting *NAACP v. Button,* 371 U.S. 415, 438, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963)).

As in the First Amendment context, however, the defendants have not had the opportunity to try to show that the ordinance meets this test. We thus direct that the district court address this issue on remand.

CONCLUSION

For the reasons set out above, we conclude that the district court's judgment must be AFFIRMED in regard to the denial of standing to bring First Amendment and equal protection challenges to the amended act, but REVERSED as to standing to bring First Amendment and equal protection challenges to the city ordinance. We also REVERSE the judgment as to the merits of both the First Amendment and equal protection claims and REMAND the case for further proceedings consistent with this opinion.

General Docket
US Court of Appeals for the Sixth Circuit

Court of Appeals Docket #: 02-1893 Filed: 7/24/02
Nsuit: 3440 Civil Rights: Other
Lac Vieux Desert v. Detroit, et al
Appeal from: Western District of Michigan at Marquette

Case type information:

1) civil
2) private
3) civil rights

Lower court information:

District: 0646-2 : 97-00067
Court Reporter: Kevin Gaugier
Trial Judge: Robert Holmes Bell,
Chief District Judge
Date Filed: 2/26/97
Date order/judgment: 7/11/02
Date NOA filed: 7/16/02

Fee status: paid

Prior cases:

97-2249 DAN EES
Date filed: 12/2/97 Date disposed: 4/12/99
Disposition: arg

Current cases:

	Lead	Member	State	End
Cross-appeal:				
	02-1893	02-1996	8/15/02	

02-1893 Lac Vieux Desert v. Detroit, et al

LAC VIEUX DESERT BAND OF LAKE SUPERIOR CHIPPEWA INDIANS, a federally recognized Indian Tribe Plaintiff-Appellant	Conly J. Schulte FTS 333-4761 402-333-4053 [COR LD NTC ret] Shilee T. Mullin FTS 333-4761 402-333-4053 [COR NTC ret] Shilee T. Mullin (See above) [COR NTC ret]

* * *

02-1893 Lac Vieux Desert v. Detroit, et al

2/18/03 Appellant RESPONSE in opposition filed regarding a motion to intervene [2690844-1]; previously filed by Carl G. Becker, for proposed intervenor Detroit, Detroit L.L.C. Response from Conly J. Schulte for Appellant Lac Vieux Desert. Certificate of service date 2/17/03. [02-1893, 02-1996] (dtk) [02-1893 02-1996]

2/18/03 Appellee RESPONSE in opposition filed regarding a motion to intervene [2690844-1]; previously filed by Carl G. Becker, for proposed intervenor Detroit, Detroit, L.L.C. Response from Michael H. Perry for Appellees. Certificate of service date 2/17/03 [02-1893, 02-1996] (dtk) [02-1893 02-1996]

2/18/03 Appellee RESPONSE in opposition filed regarding a motion to intervene [2690844-1]; previously filed by Carl G. Becker, for proposed intervenor Detroit, Detroit, L.L.C.. Response from Peter H. Ellsworth for Appellee MGM Grand. Certificate of service date 2/18/03 [02-1893, 02-1996] (dtk) [02-1893 02-1996]

2/18/03 Appellee RESPONSE in opposition filed regarding a motion to intervene [2690844-1]; previously filed by Carl G. Becker, for proposed intervenor Detroit, Detroit, L.L.C.. Response from John D. Pirich and Bruce R. Greene for Appellee Greektown Casino and Atwater Entertain. Certificate of service date 2/17/03 [02-1893, 02-1996] (dtk) [02-1893 02-1996]

2/18/03 Briefing Letter Sent by CONFERENCE ATTORNEY'S OFFICE resetting cross appeal briefing schedule: first brief due 3/24/03; second due 4/23/03; third due 5/23/03; fourth due 6/6/03; joint appendix due 6/13/03; all finals due 7/7/03. [02-1893; 02-1996] (trm) [02-1893 02-1996]

2/24/03 REPLY filed to Atwater Entertainment, and Greektown Casinos response to the motion to intervene filed by Detroit, Detroit LLC. Response from Carl G. Becker for Detroit Detroit LLC. Certificate of service date 2/24/03. [02-1893, 02-1996] (dtk) [02-1893 02-1996]

3/3/03 Appellant MOTION filed to file a late response to Detroit, Detroit LLC's reply to Atwater Enter., and Greektown Casino LLC's response to Detroit Detroit LLC's motion to intervene. Motion filed by Conly J. Schulte for Appellant Lac Vieux Desert. Certificate of service date 2/28/03 [02-1893, 02-1996] (dtk) [02-1893 02-1996]

3/3/03 Supplemental REPLY filed in favor of Detroit, Detroit LLC's motion to intervene [2690844-1] previously filed by Carl G. Becker for proposed intervenor Detroit, Detroit LLC.

* * *

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

LAC VIEUX DESERT BAND OF LAKE SUPERIOR CHIPPEWA INDIANS, a federally recognized Indian Tribe,

Plaintiff-Appellant,

v.

THE CITY OF DETROIT, MICHIGAN, KWAME KILPATRICK, MARY ANN MAHAFFEY, KENNETH V. COCKREL, JR., SHEILA COCKREL, BRENDA M. SCOTT, SHARON MCPHAIL, ALBERTA TINSLEY-TALABI, ALONZO W. BATES, BARBARA ROSE COLLINS and KAY EVERETT,

Defendants-Appellees,

and

GREEKTOWN CASINO, LLC, MGM GRAND DETROIT, LLC and DETROIT ENTERTAINMENT, LLC.

Intervenor/Defendants-Appellees

Case No. 02-1893: 02-1996

/

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/

SUPPLEMENTAL REPLY IN FAVOR OF DETROIT, DETROIT, L.L.C.'S MOTION TO INTERVENE

(Filed Mar. 8, 2003)

* * *

INTRODUCTION

Detroit, Detroit, L.L.C. (hereinafter "Detroit LLC") filed a timely Reply in the instant motion on February 24, 2003. However, since that time, it has been served with responses from Appellant, Lac Vieux Desert Band of Lake Superior Chippewa Indians (hereinafter "LV") and MGM Grand Detroit, LLC (hereinafter "MGM"). Much of those responses are dedicated to the timeliness of Detroit LLC's Motion to Intervene and Detroit LLC's standing.[1]

TIMELINESS

MGM is objecting to Detroit LLC's Motion to Intervene based on timeliness when it only became an Intervening Defendant in April of 2002. (MGM Response page

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[1] It is worth noting that much of the argument against Detroit LLC having standing is based on a Consent and Release signed by all potential casino developers with the City of Detroit. The City of Detroit is the only party which may raise that Release as a bar to Detroit LLC's Motion but the City has chosen not to do so. This issue is fully briefed in Detroit LLC's Reply filed on February 24, 2003. LV and MGM stand in the same position as the other parties that have filed a response to the instant motion.

As with the other Response filed in this matter, MGM and LV have made gross mischaracterizations of the impact of the Release on constitutional issues. This Court has unequivocally stated "insistence upon execution of the Release as a condition of participation in the selection process may or may not be constitutional . . . " *Bardon Detroit Casino, L.L.C. v. The City of Detroit*, 230 F.3rd 848, 855 (6th Cir. 2000).

6). That intervention by MGM tends to nullify any argument that Detroit LLC should have attempted to intervene six years ago at the onset of this litigation. Six years ago, MGM was also aware of the instant litigation. Six years ago, presumably, MGM also signed a release. Six years ago, MGM knew that if LV was successful its permanent license at a minimum was voidable.

However, MGM chose not to intervene until four months after the preference section of the Detroit City Ordinance was ruled unconstitutional in January of 2002. See *Lac Vieux Desert Band of Lake Superior Chippewa Indians v. The Michigan Gaming Control Board, et al.*, 276 F 3d 876, 879 (6th Cir. 2002). MGM became an intervening party only three months prior to Detroit LLC filing its Motion to Intervene in the District Court and after this lawsuit had already been appealed to the Sixth Circuit twice. In light of the fact that the briefing schedule in this Court has been adjourned several times due to the mediation process, it is hard for anyone to argue that Detroit LLC causes prejudice to this matter any more than MGM causes prejudice to this matter when it joined the litigation less than a year ago.

Absolute measures of timeliness should be ignored. *Stupak-Thrall v. Glickman*, 226 F. 3d 467, 475 (6th Cir. 2000); *Sierra Club v Espy*, 18 F.3d 1202, 1205 (5th Cir. 1994). In fact, the Western District of Michigan has not hesitated to grant intervention in the past despite the passage of months and even years. *Usery v Brandel*, 87 F.R.D. 670, 674 (Western District of Michigan 1980) (In *Usery* the Court granted applicant's motion despite the fact it was filed ten months after the complaint and an additional fourteen months elapsed before the court received the applicant's supporting brief. See also, *Mountain Top*

Condo Ass'n v Dave Stabbert Master Builder, Inc., 72 F. 3d 361, 370 (3rd Cir. 1995) (Court allowed intervention as of right where four years had passed between the filing of the complaint and the motion to intervene).

In the matter at hand, although approximately a year has passed since the preference of the Detroit City Ordinance was ruled unconstitutional, and only nine months has elapsed since MGM was allowed to intervene in this matter, as in *Usery* "such mere passage of time . . . does not of itself render the application untimely". *Usery* at 674.

In the instant matter, Detroit LLC, in regard to timeliness, stands similarly situated to MGM in that there will be no prejudice to the other parties. Detroit LLC, with the extended Briefing Schedule, is easily able to assimilate itself into the case. Even as a case moves towards trial [final resolution] "intervention should not be denied if another party could be readily assimilated into the case". *Usery* at 675.[2]

It is worth noting that the opposing parties are criticizing Detroit LLC having waited until its rights were not adequately protected by the current parties, however, MGM also did not bring its motion until it felt its rights were not adequately protected and a decision by the Court could affect its interest. MGM came into the case after LV made it clear that at least one of the remedies is sought

[2] Movant acknowledges that the *Usery* matter was in the early stages of discovery, however, the principles still apply since Detroit LLC can be readily assimilated and just as easily provide a brief to this court in a timely manner as other intervenors to this matter and the original parties.

was new bidding as to everyone, and MGM perceived that since it was not a preference choice finalist it had a different interest than the other finalists to protect. Now that LV and the defendants are negotiating money as the sole solution to LV instead of rebidding Detroit, LLC realizes that positions have shifted and it now has its particular position to protect. Nobody opposed MGM despite the fact that MGM allowed four months to elapse from the January, 2002 ruling before it filed its Motion to Intervene.

STANDING

The standards for having proper standing have been adequately briefed in the other pleadings regarding this Motion and will not be repeated herein. However, it is worth comparing Detroit LLC's interest in this matter with that of MGM. MGM became involved in this matter by way of intervention because it had a perception that its interest might be different than the interest of the other intervening casinos. MGM's perception is simply that, a perception, and there is not a guaranteed concrete difference. Nobody objected to the MGM intervention for the patently obvious reason that MGM's economic strength would give the other intervening defendants financial wherewithal to potentially deal with the litigation and assist in any closure to it. This despite the fact that MGM all along had standing. Compare that to Detroit LLC, which did not have standing until January, 2002. Detroit, LLC filed its motion to intervene only 90 days after MGM. Unfortunately, almost concurrent with Detroit LLC's filing in the District Court, the matter went up on appeal and the District Court lost jurisdiction.

Just like MGM, Detroit LLC stayed in tune to what was going on in the case, had discussions with LV and other parties and was satisfied, at all stages, that this matter would be handled fairly and appropriately. Even after the District Court ruled that no new bidding procedures were appropriate and that only attorney fees were awardable to LV, due to its hard work there was no perception that LV would have any interest other than working for a meaningful remedy to rectify the unconstitutional preference. However, this Court's own mediation process placed LV and others in an entirely different perspective since economics and money rather than remedy seemed to take the order of the day and it became obvious that the interest of LV and Detroit LLC were becoming divergent.

The casinos believe that the problem with the unconstitutional preference should not be rectified and that money could rectify any of LV's problems, however, that would not rectify all the other "ready and able" applicants who are affected by the unconstitutional preference.[3] There are obviously thousands of potential variations and remedies that could be fashioned. MGM makes an interesting argument at the end of its Brief that if a remedy is fashioned, why does Detroit LLC need to participate when it will be treated like everybody else. (See page 12 of MGM's Response Brief.) That is an assumption without

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[3] LV were not participants in the original bidding process but were determined by this Court to be "ready and able" to participate and thus had standing. *Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Michigan Gaming Control Board*, 172 F. 3d 397, 406 (6th Cir. 1999).

any basis in fact. Bidding could take almost any form, wide open bidding, bidding only by parties who were ready and able to participate back when the process originally occurred, bidding by "ready and able" and the original eleven developers, bidding by something less than that based upon second or final round selections as well as the net worth of applicants, track records, etc.

It is interesting that MGM, a party that waited five years to intervene in this matter, claims that a three year Statute of Limitations applies. Such a conclusion is without merit. Detroit LLC is not claiming that there was an injury to a person or property, but rather it lost out on the expectation of being able to fairly bid on a casino license. In Michigan, when there is no claim of injury to person or property, but rather future expectations, a six year Statute of Limitations applies. *Borman's Inc. v Lake State Development Co., et al*, 60 Mich. App. 175, 188-189 230 NW 2nd 363, 370-371 (1975); *Schenburn v Lehner Associates, Inc.*, 22 Mich. App. 534, 177 NW 2nd 699 (1970); MCLA 600.5807(8).

CONCLUSION

The objecting parties in this matter do not want Detroit LLC to intervene because it appears to be their hope that money will make this constitutional issue go away. Detroit LLC wants to intervene for precisely that reason. This Court's mediation process ostensibly began in August of 2002 and approximately five months thereafter Detroit LLC filed its Motion to Intervene similar to MGM which waited four months after the January, 2002 ruling to file its Motion. Detroit LLC should be allowed to

intervene as it now appears that its interest will not be adequately represented.

WHEREFORE, DETROIT, DETROIT, LLC prays that this Honorable Court allow it to be an intervening party to this lawsuit and grant such other and different relief as just and equitable.

Respectfully submitted,

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